

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

GREG MOORE, PATRICIA MOORE, AND MICHAEL MOORE,
Plaintiffs/Petitioners/Appellants,

v.

CITY OF TUCSON,
Defendant/Respondent/Appellee.

No. 2 CA-CV 2019-0184
Filed August 4, 2020

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20191313
The Honorable Leslie Miller, Judge

AFFIRMED

COUNSEL

Michael Garth Moore, Tucson
Counsel for Plaintiffs/Petitioners/Appellants

Michael G. Rankin, City Attorney
By Dennis P. McLaughlin and Sarah E. Pace,
Principal Assistant City Attorneys, Tucson
Counsel for Defendant/Respondent/Appellee

MOORE v. CITY OF TUCSON
Decision of the Court

MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Chief Judge Vásquez and Judge Eppich concurred.

BREARCLIFFE, Judge:

¶1 Greg Moore, Patricia Moore, and Michael G. Moore (“the Moores”) appeal from the trial court’s September 10, 2019 order dismissing their complaint against the City of Tucson (“the city”), in which they sought public records. The Moores first contend that the trial court erred in reviewing the documents *in camera* without first determining the sufficiency of the city’s justifications in overcoming the presumption that the documents were public records subject to disclosure. They then contend it erred in failing to require the city to produce a privilege log. Finally, they contend the court committed “prejudicial error” and denied the Moores due process in thereafter dismissing the case. We affirm.

Factual and Procedural Background

¶2 In October and December 2018, the Moores submitted two public records requests to the City of Tucson, requesting full disclosure of “records of complaints and criminal investigations conducted by the Tucson Police Department” pertaining to an investigation into the Moores’ involvement with an incident of arson. The city produced some of the requested documents, with some of those documents redacted. The Moores then filed a statutory special action under Arizona’s public records statutory scheme, A.R.S. §§ 39-101 to 39-161, and an “Application for Order to Show Cause” seeking production of the public records. The Moores requested, among other things, “[a]n Order enjoining the [city] from withholding any records” and “[a]n Order requiring immediate submission of an index of documents withheld sufficient for the Petitioners to evaluate the nature of any objection and substantiation for withholding of any document.”

¶3 The trial court held a show-cause hearing, and the city indicated that it would provide approximately two thousand pages of documents for an *in camera* review. The court conducted an *in camera* review of the documents and allowed the Moores to submit a supplemental

MOORE v. CITY OF TUCSON

Decision of the Court

memorandum articulating their position as to specific redactions, which they filed. The court then denied the Moores' motion for production of the documents and, on September 10, 2019, dismissed their complaint against the city with prejudice. This appeal followed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

Analysis

¶4 “We review de novo whether the denial of access to public records is wrongful,” but defer to the trial court’s findings of fact. *W. Valley View, Inc. v. Maricopa Cty. Sheriff’s Office*, 216 Ariz. 225, ¶ 7 (App. 2007). If no request for findings of fact has been made, we infer the findings necessary to uphold the trial court’s ruling. *See Tencza v. Aetna Cas. & Sur. Co.*, 111 Ariz. 226, 228 (1974).

¶5 Under Arizona law, “public records and other matters . . . shall be open to inspection by any person.” A.R.S. § 39-121. “The fact that the public records exist is sufficient to create a presumption requiring disclosure.” *Hodai v. City of Tucson*, 239 Ariz. 34, ¶ 7 (App. 2016). A public officer may refuse inspection by showing that non-disclosure serves “the countervailing interests of confidentiality, privacy or the best interests of the state.” *Carlson v. Pima County*, 141 Ariz. 487, 491 (1984). “Such discretionary refusal is subject to judicial scrutiny.” *Id.* The best interests of the state include the “overall interests of the government and the people.” *Phx. Newspapers, Inc. v. Keegan*, 201 Ariz. 344, ¶ 18 (App. 2001). The state has the burden of overcoming “the legal presumption favoring disclosure.” *Cox Ariz. Publ’ns, Inc. v. Collins*, 175 Ariz. 11, 14 (1993).

In Camera Review

¶6 On appeal, the Moores argue that the trial court “erred in granting the city’s motion to submit all documents *in camera* without first making a determination as to the sufficiency of the city’s submissions in overcoming the presumption that the documents were public records subject to disclosure.” The Moores did not, however, claim below that the court was required to determine the sufficiency of the city’s submissions before conducting an *in camera* review. To the contrary, at an evidentiary hearing, the Moores stated, “if the Court has any interest in hearing and seeing these documents, I would ask the Court order this in camera production of all these documents to be made immediately.” Thus, the Moores not only failed to present this argument below, it appears they requested the court conduct the type of review challenged on appeal. They have consequently waived the issue on appeal. *See Harris v. Cochise Health*

MOORE v. CITY OF TUCSON

Decision of the Court

Sys., 215 Ariz. 344, ¶ 17 (App. 2007) (“appellate court will not consider issues not raised in the trial court” (quoting *Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 503 (1987)); *Caruthers v. Underhill*, 235 Ariz. 1, ¶ 23 (App. 2014) (one who leads the court to take certain action may not assign that action as error upon appeal). We therefore decline to address this argument.

Privilege Log

¶7 The Moores also argue that the trial court “erred in failing to require the City to produce a privilege log.” The Moores claim that a privilege log would have allowed them a “meaningful opportunity to assess the City’s ground(s) for withholding a specific document and challenge non-disclosure” and that the “only avenue which would have met the requirement of due process would have been for the trial [c]ourt to require a privilege log – in addition to a sufficient declaration.” The Moores claim that this log should “identify with particularity the documents withheld, including information on the date of creation, the author, the title or caption, an addressee and recipient, and the general purpose for creation.”

¶8 Under A.R.S. § 39-121.01(D)(2), “[i]f requested, the custodian of the records of an agency shall also furnish an index of records or categories of records that have been withheld and the reasons the records or categories of records have been withheld from the requesting person.” During the proceedings in the trial court, the city provided the Moores with an index that provided an identifying number and the claimed legal rationale for redacting or withholding the documents. The city also requested, and the court granted it, the ability to provide the court with an additional revised index for *in camera* review.

¶9 On appeal, the Moores claim the trial court erred in not requiring the city to also provide them a more detailed index. We do not agree. The index the city provided was sufficient under § 39-121.01(D)(2) – it identified both the records withheld and the reasons for which the records were withheld. The law requires no more than this.

Trial Court Findings and Dismissal

¶10 The Moores next argue that they were deprived of due process when the trial court failed “to consider and analyze each document against the presumption – and [failed to] memorialize any manner how it

MOORE v. CITY OF TUCSON

Decision of the Court

conducted whatever analysis it did do” and thus left them “with no opportunity to contest those determinations below, or in this [c]ourt.”

¶11 As an initial matter, the Moores never objected to the trial court’s lack of findings and conclusions below to give it an opportunity to address the alleged insufficiency. Failure to object waives the issue on appeal, and even constitutional issues not objected to below are waived. *Haab v. County of Maricopa*, 219 Ariz. 9, ¶ 25 (App. 2008) (finding waiver of due process argument). Nevertheless, the Moores have cited no authority to establish that the public records statutory scheme requires the court to make findings of fact or conclusions of law in ruling on a public records request. Nor did they request that the court make specific findings of fact and conclusions of law pursuant to Rule 52(a), Ariz. R. Civ. P. See *Ariz. Bd. of Regents v. Phx. Newspaper, Inc.*, 167 Ariz. 254, 257 (1991) (applying Rule 52 to special action seeking public records); *Paradigm DKD Group, LLC v. Pima Cty. Assessor*, 246 Ariz. 429, ¶ 5 (App. 2019) (same); *Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm’n*, 160 Ariz. 350, 353 n.8 (1989) (“[O]ur courts customarily apply the Rules of Civil Procedure . . . in special action proceedings unless the special action rules expressly prohibit the practice.”). Consequently, we find no error in the court’s failure to detail findings of fact and conclusions of law.

¶12 The Moores finally claim that the trial court “committed prejudicial error in dismissing the action after concluding that the redactions in the produced documents, and the withholding of the remaining . . . files qualified for exemption from the presumption that the documents were public.” However, the Moores make no argument supporting this claim except the above argument that the court failed to memorialize its analysis thus depriving them of due process. As discussed, the court was not required to memorialize its analysis, and thus, given that the Moores do not provide any additional argument in regards to the court’s ruling, we find no error in the court’s ultimate dismissal of the action.

Disposition

¶13 For the foregoing reasons, we affirm the trial court’s September 10, 2019 order dismissing the Moores’ complaint with prejudice.